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HAND DELIVERED

NOAA Section 525 Officer
NOAA Executive Secretariat
Herbert C. Hoover Building – Room 5230
14th Street and Constitution Avenue, NW
Washington, DC 20230

Mr. Thomas N. Pyke, Jr.
Chief Information Officer
United States Department of Commerce
Room 5029B
Washington, DC 20230

**Re: Appeal of Denial of Request for Correction of Information:
Petition to Cease Dissemination of the Biological Reference
Points for Northeast Multispecies (New England Groundfish)
Contained in Draft Multispecies FMP**

Dear NOAA Section 525 Officer and Mr. Pyke:

1. Introduction

The Associated Fisheries of Maine, Inc. ("AFM") and the Trawlers Survival Fund ("TSF") appeal the December 15, 2003, Denial by the Department of Commerce/National Oceanic and Atmospheric Administration ("NOAA") of their October 16, 2003, request for correction of information, under Section 515 of Public Law 106-554, the Federal Data Quality Act ("FDQA").

In their initial request, Petitioners requested that NOAA comply with the FDQA by immediately ceasing dissemination of the "Revised Biological Reference Points for New England Groundfish" incorporated in the Draft Amendment 13 to the Northeast Multispecies Fishery Management Plan (and incorporated Supplemental Draft Environment Impact Statement) ("Draft Amendment 13").

Below, Petitioners set forth "a statement for the reasons why [Petitioner] believes the initial denial was in error" as required by NOAA's Information Quality Guidelines, Part III.D.1.

2. Reasons Why NOAA's Initial Denial of Petitioners' Request Was In Error

In its December 15, 2003, Denial of Petitioners' Request for Correction ("NOAA Denial"), NOAA details its rationale for concluding that its dissemination of the revised biological reference points for the northeast multispecies stock complex ("New England groundfish") now contained in Amendment 13 to the Northeast Multispecies Fishery Management Plan ("Amendment 13") satisfies the mandates of the FDQA. Petitioners have set forth their position that dissemination of the reference points failed to comply with the requirements of the FDQA in the October 16, 2003, Request for Correction at 4-6) (attached to this Appeal).

Petitioners respectfully appeal that decision for the following reasons:

- 1) NOAA alleges that the "revised biological reference points . . . have been subject to formal, independent, external peer review." NOAA Denial, at 1. Now that the issue of the peer review panel has been put in issue, Petitioners note that the actual "independence" of one member of the peer review panel is questionable and that this issue has previously been brought to the attention of the agency. See Letter to Manoj Shrivani, April 7, 2003 (appended hereto w/o attachments). The reviewer most supportive of the data's quality, Mr. Murdoch McAllister, did not meet the standards for independence which were established to govern the peer review process.
- 2) NOAA maintains that the reference points at issue satisfy the FDQA's definition of "useful," because they are "helpful, beneficial, or serviceable, to its intended users." NOAA Denial, at 2. While NOAA is correct that the FDQA's definition of utility requires that data be "beneficial" to its users, NOAA lacks a sufficiently sound basis to conclude that the reference points are "beneficial" if they are potentially badly wrong.

To wit, the peer review panel could not determine whether the published reference points were better than the points derived from the age-structured production modeling ("ASPM") approach employed by Dr. Douglas Butterworth, another recognized expert in the field who has been retained by Petitioners. Since the values for the points differ substantially under the two approaches and the Agency has refused to undertake the comparative analysis of the two approaches, the peer review panel could not exclude the possibility that the NEFSC results were wrong.

Accordingly, the Agency does not have a sufficiently sound basis for concluding the reference points were "useful" if they cannot demonstrate that they are demonstrably more correct than other viable approaches yielding divergent results.

3) NOAA maintains that in developing the reference points, it "examined significant new data and methodological improvements available to researchers." NOAA Denial at 2. While NOAA may have examined methodological improvements, the examination was not (nor did it claim to be) an exhaustive one; in particular they did not consider the ASPM approach suggested by Petitioners' expert, Dr. Butterworth, which approach is in use around the world, and in the U.S. Alaska Pollock fishery.

4) NOAA maintains that its results uniquely constitute "the best available scientific information." NOAA Reply at 3. This position is simply logically irreconcilable when there is other appreciable different information in the form of the ASPM results which the peer reviewers could not discriminate as worse (or better). In circumstances where there are competing and valid approaches worthy of consideration, it is not apt to classify only one of the two views as "best available science."

5) While the peer reviewers use the qualification "adequate" for the scientific approach utilized to develop the reference points (NOAA Reply at 3, 4), NOAA's reply inaccurately uses this description to maintain that the approach constituted the "best available scientific information." Nowhere, however, does NOAA offer any evidence that the "adequate" approach is actually the "best" approach.

Similarly, NOAA describes its approach as the "best" and "most appropriate." NOAA Reply at 3. In doing so, it dubiously equates the peer reviewers' inability to discriminate between the approaches to their choice being the best approach.

6) NOAA inaccurately asserts that it has maintained an "ongoing correspondence" with Petitioners' expert, Dr. Butterworth. NOAA Reply at 4. In fact, NOAA has had substantive correspondence with Dr. Butterworth on only one occasion, a September 12, 2003, letter to Dr. Butterworth. Further, while NOAA describes that letter as detailing problems with Dr. Butterworth's approach, the Denial fails to note that Dr. Butterworth submitted a detailed response on October 10, 2003, addressing all of the concerns raised by NOAA.

Further, NOAA's Denial maintains that Dr. Butterworth's response has not been "subjected to formal peer review." NOAA Reply at 4. As Petitioners noted in their initial Request for correction:

The age-structured production model approach is in use around the world, including in the Alaska pollock fishery. In addition, we now understand that the Northeast Fisheries Science Center is already employing another variant of that approach as an alternative for certain stocks within its purview (witch flounder and Acadian redfish). We further understand that use of the ASPM approach employed by Dr. Butterworth would allow for the use of more landings and survey data and less extrapolation than the ADAPT-VPA approach in estimating reference points.

Petitioners' Request for Correction at 5. As noted, the ASPM model is very similar to that used for southern bluefin tuna, and for many west coast US fisheries, including that for Alaskan pollock, with associated international reviews in many cases.

In addition the APSM model has been reviewed:

- a) by an international review meeting in Cape Town in November 2000, where the reviewers included a Northeast Fisheries Science Center scientist;
- b) as part of a masters thesis prepared by one of Dr. Butterworth's co-workers (awarded with distinction last year), the reviewers for which included two senior National Marine Fisheries Service stock assessment experts;
- c) in a peer-reviewed article in press in the Bulletin for Marine Science;
- d) by an international review panel appointed for the Marine Stewardship Council review of the trawl fishery for South African hake (which included NMFS officials).

Further reviews are currently taking place at an international meeting in Cape Town, South Africa this month, with reviewers including senior NMFS stock assessment officials.

3. Conclusion

NOAA's Denial fails to address the central concern set forth in Petitioners' Request for Correction, to wit, that NOAA has failed to investigate the difference between their results and the ASPM model. Petitioners' Request for Correction at 4-6. NOAA has provided no evidence that its model is superior to the ASPM model and has, in fact, not been engaging Dr. Butterworth and his colleagues in the kind of meaningful, constructive dialogue to resolve the issue, as recommended by the International Peer Review and warranted by Dr. Butterworth's work and modeling approach.

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Accordingly, NOAA's Reply fails to demonstrate that Amendment 13's revised biological reference points meet the FDQA, as well as OMB and/or Commerce/NOAA Guidelines regarding data quality. See OMB Government-wide Information Quality Guidelines. As a consequence **Commerce/NOAA must immediately cease electronic and other dissemination of the unacceptable data provided by NMFS, as defined by OMB, and now Commerce and NOAA, and described above.**

Respectfully submitted,
Brand & Frulla, P.C.



David E. Frulla
Shaun M. Gehan
Andrew D. Herman

Counsel for Associated Fisheries of Maine
and the Trawlers Survival Fund

DEF/SMG:mlc
Attachments

cc: William T. Hogarth, Ph.D (via hand delivery)
Mr. David Borden, Chair, NEFMC